Filed 12/13/16 Alers v. Bank of America CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ALEJANDRO ALERS, SR., Plaintiff and Appellant, v. BANK OF AMERICA, Defendant and Respondent.	B266958 (Los Angeles County Super. Ct. No. BC586108)

APPEAL from orders of the Superior Court of Los Angeles County, Barbara M. Scheper, Judge. We reverse the sanctions order against Alers and otherwise affirm the trial court's orders.

Alejandro Alers, Jr. for Plaintiff and Appellant Alejandro Alers, Sr.

Severson & Werson, Jan T. Chilton, and Erik Kemp for Defendant and Respondent.

Alejandro Alers, Sr. (Alers), represented by his son, Alejandro Alers, Jr. (Alers, Jr.), appeals from the order dismissing his action in equity to set aside the adverse judgment entered in Alers's prior lawsuit for breach of contract and fraud against the Bank of America, N.A., and from the order, entered jointly and severally against Alers and Alers, Jr., to pay Bank of America $6,789 in monetary sanctions pursuant to Code of Civil Procedure section 128.7 (section 128.7) for filing a frivolous lawsuit that was presented primarily for an improper purpose. We reverse the sanctions order against Alers and otherwise affirm the trial court's orders.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Stolen $4,500 Check and Alers's Original Lawsuit*[1]

a. *The $4,500 debit to Alers's account*

On June 30, 2008 at the Midtown Center Branch of Bank of America in Los Angeles, Alers deposited a $600 United States Treasury (Social Security) check, payable to Alers, into his individual checking account. Alers's check card was presented and swiped at the teller window, and his personal identification code was entered at the time of the transaction. Alers also withdrew $1,000 from his account. At approximately the same

---

[1] Much of the background of Alers's dispute with Bank of America and his original lawsuit for fraud and breach of contract is detailed in our nonpublished opinion in *Alers v. Wright* (June 27, 2016, B265070), Alers's appeal from the adverse decision in his action against the lawyers who had represented Bank of America in that lawsuit. Our factual discussion borrows from our earlier opinion where appropriate.

time as the $1,000 withdrawal, a non-Bank of America check for $4,500, made out to cash from the account of Maria Gordillo and purportedly signed by her, was cashed using Alers's checking account as security for payment. The check was not endorsed, and Alers's name does not appear on it. All three transactions were handled by the same teller (identified only as bank teller no. 10) within several minutes of each other.

The $4,500 check was returned unpaid to Bank of America by Gordillo's bank because Gordillo's account was closed. On July 9, 2008, pursuant to the terms of Alers's checking account-deposit agreement, Bank of America debited $4,500 from Alers's checking account. Alers's monthly statement from the bank dated July 22, 2008 reflected the debit and indicated it was made because of a returned item.

Alers filed a claim with the bank, insisting he did not know Gordillo and had not cashed the $4,500 check. (Gordillo subsequently reported a batch of her checks, including the one involved in this dispute, had been stolen; her signature on the $4,500 check was forged.) On August 1, 2008 the bank's fraud claims department rejected Alers's claim, explaining "[t]he transaction was processed using your Bank of America ATM/Debit Card and personal identification number." According to Alers, the bank subsequently reconsidered its denial of his claim and agreed, both orally and in writing, to return the debited amount to his checking account. However, the bank thereafter refused to do so. (The bank disputed Alers's assertion that it had agreed to reverse the debited item and challenged the authenticity of letters he claimed he had received from the bank confirming its agreement to reverse the charge.)

b. *Alers's initial lawsuit against Bank of America*

On February 16, 2012 Alers, represented by Alers, Jr., sued Bank of America in superior court for breach of contract and fraud. The matter was reclassified as a limited civil case.

Bank of America moved for summary judgment supported, in part, by a declaration from Marisa Bilog, a litigation specialist with the bank. Bilog declared she was familiar with, and had access to, the electronic systems used by the bank to create and record information related to customer accounts, including checking accounts. Bilog explained she had reviewed certain of the bank's electronic business records relating to Alers's checking account and based on that review, on information and belief, she described the various transactions that took place between teller no. 10 and Alers on June 30, 2008. Her declaration attached as exhibits copies of teller no. 10's teller log, the check and deposit slip for Alers's $600 deposit and the $4,500 cashed check, as well as a copy of Alers's deposit agreement with the bank.

Alers opposed the motion, disputing most of the facts upon which the bank relied. Alers also objected to Bilog's declaration on the ground she lacked personal knowledge of the facts stated (principally, that Alers had cashed the $4,500 check).

On April 11, 2013 the court granted Bank of America's motion for summary judgment. With respect to Alers's breach of contract claim, the court ruled the agreement governing Alers's checking account authorized Bank of America to charge his account if a cashed item was returned and Alers had failed to demonstrate a triable issue of material fact existed with regard to that question of contract interpretation. With respect to Alers's fraud claim, which was based on Bank of America's purportedly

false statements it would reverse the debited item, the court ruled Alers could not show his reasonable reliance on the purported misrepresentations was a substantial factor in causing him harm: "Alers lost the $4500 debited his account from the [check] fraud; he did not lose more because he relied on the bank's letters."[2]

Judgment was entered in favor of Bank of America on April 11, 2013. Alers appealed. On October 18, 2013 the appellate division affirmed the judgment, ruling Alers had failed to provide an adequate record for review.

2. *Alers's subsequent federal and state court actions against the bank and its lawyers*

a. *The federal RICO action*

In January 2014 Alers, once again represented by Alers, Jr., filed a lawsuit against Bank of America in United States District Court for violation of the Racketeer Influenced and Corrupt Organizations Act, title 18 of the United States Code section 1961 et seq. (RICO). Alers now alleged that bank teller no. 10 had stolen checks from Gordillo and forged her signature on one of those checks made out to cash in the sum of $4,500. After Alers completed his deposit of $600 and withdrawal of $1,000 and walked away from the teller's window, bank teller no. 10 either reopened his account or allowed it to remain open and then cashed the check using Alers's checking account as security for payment. According to Alers's complaint, lawyers Mark Wraight and An Le, as well as the bank's in-house fraud

---

[2] The trial court left unresolved the issue of the letters' authenticity, assuming for purposes of the summary judgment motion they were from the bank.

claims investigators, gained full knowledge of teller no. 10's forgery and embezzlement during discovery in the state court action. Rather than disclose this information to the court or rectify the wrongful debiting of Alers's checking account, the bank, Wraight and Le conspired with each other to defraud Alers of the debited amount by misrepresenting and omitting facts in the state court litigation.

After several rounds of briefing the district court granted Bank of America's motion to dismiss the complaint for failure to state a claim. To the extent Alers's federal lawsuit was based on events that preceded his unsuccessful state court lawsuit (for example, the allegation that the bank's in-house counsel committed wire fraud when he allegedly promised Alers during a telephone call in September 2011 that the bank would return the $4,500 to Alers's checking account), the court held it was barred by the doctrine of res judicata (claim preclusion) based on the final judgment in that action. To the extent Alers was now alleging actions by the bank in the state court lawsuit itself, and through the conspiracy allegation challenging the conduct of the bank's lawyers, the court held the RICO claim was barred by the *Noerr-Pennington* doctrine[3] as protected petitioning activity.

---

[3] "The *Noerr-Pennington* doctrine [*Eastern R. Conf. v. Noerr Motors* (1961) 365 U.S. 127 [81 S.Ct. 523, 5 L.Ed.2d 464]; *Mine Workers v. Pennington* (1965) 381 U.S. 657 [85 S.Ct. 1585, 14 L.Ed.2d 626] is a broad rule of statutory construction, under which laws are construed so as to avoid burdening the constitutional right to petition. [Citation.] In effect, the doctrine immunizes conduct encompassed by the petition clause—i.e., legitimate efforts to influence a branch of government—from

Alers's appeal from the district court's judgment of dismissal is still pending.

b. *The state court action against the lawyer defendants*

In December 2014 Alers, represented by Alers, Jr., filed a new state court action, naming Wraight, Le and Severson & Werson, the lawyers who had represented Bank of America in both Alers's earlier state court and his federal RICO lawsuits, as defendants. The complaint described the two prior actions and alleged the lawyer defendants had knowingly asserted frivolous affirmative defenses in the answer filed on behalf of the bank, made false statements to the court in connection with the bank's motion for summary judgment, improperly redacted portions of an exhibit submitted in support of that motion and failed to disclose to the trial court information that was inconsistent with the bank's theory Alers had cashed the $4,500 check. Based on these allegations Alers attempted to plead a variety of causes of action including fraud, intentional interference with contractual relations and financial elder abuse.

The lawyer defendants moved to strike Alers's complaint pursuant to Code of Civil Procedure section 425.16 (an anti-SLAPP motion). In an order dated May 18, 2015 the court granted the motion, finding that each of Alers's 13 causes of action arose from the lawyer defendants' protected petitioning activity—their statements and conduct in defending Bank of America in the 2012 state court lawsuit—thereby satisfying section 425.16's threshold requirement, and that those actions were absolutely privileged under Civil Code section 47,

---

virtually all forms of civil liability." (*Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1064-1065.)

subdivision (b), the litigation privilege. Accordingly, Alers had failed to demonstrate a probability of prevailing on any of his claims. We affirmed the trial court's order dismissing the lawsuit in *Alers v. Wright* (June 27, 2016, B265070) [nonpub. opn.].

3. *The current lawsuit to set aside the original judgment in favor of Bank of America*

On June 24, 2015, while his appeal from dismissal of his action against the lawyer defendants was still pending in this court, Alers, yet again represented by Alers, Jr., filed a complaint captioned, "Independent Action in Equity To Set Aside Prior Judgment in Defendant's Favor Obtained by Extrinsic Fraud and in the Absence of a Fair Adversarial Hearing or Trial at Law." The new complaint alleged, in essence, the April 11, 2013 judgment in favor of Bank of America had been obtained as a result of the bank's submission of intentionally false statements in support of its motion for summary judgment, which Alers asserted constituted extrinsic fraud.

Specifically, Alers alleged that Bilog had falsely declared she had personal knowledge of all facts stated in her declaration in support of the motion for summary judgment; the bank's attorneys knew in advance of filing the motion the $4,500 check had been stolen, forged and cashed by teller no. 10 and concealed material information from him and the court; and the redacted version of the deposit agreement submitted with the motion omitted key portions of the agreement and, as a result, inaccurately represented the bank's rights with respect to returned checks. Alers further alleged the court had relied on this false evidence and improperly weighed conflicting evidence in ruling in Bank of America's favor. Finally, Alers alleged he was "not given a fair opportunity to present his case because

there was no trial." The complaint prayed that the April 11, 2013 judgment be vacated and that Alers be permitted to proceed to trial on the claims alleged in his original lawsuit.

Bank of America demurred to the complaint, arguing Alers had alleged only intrinsic fraud, which is not an appropriate basis for setting aside a final judgment. The bank also moved for sanctions pursuant to section 128.7, contending, as to Alers and Alers, Jr., the lawsuit was initiated for an improper purpose: "to harass [Bank of America into paying him money through] unnecessary delay or needless increase in the cost of litigation" (§ 128.7, subd. (b)(1)); and as to Alers, Jr., the claim of extrinsic fraud asserted in the lawsuit was objectively unreasonable and not warranted by existing law (§ 128.7, subd. (b)(2)). Alers filed a written opposition to the demurrer, but no opposition to the motion for sanctions.

The trial court sustained the demurrer without leave to amend, agreeing with Bank of America that Alers's claims were based on allegations of intrinsic fraud, not extrinsic fraud or mistake, and granted the motion for sanctions, concluding the action was "clearly legally unsound." The court additionally found, "as the instant action appears to be the fourth attempt by plaintiff to address a dispute over a $4,500 debit to his bank account in 2008, it is clearly designed to harass defendant and cause unnecessary expense." The court ordered Alers and Alers, Jr. to pay the bank's counsel $6,789 and directed that notice of the court's ruling imposing sanctions against Alers, Jr. be reported to the State Bar.

The court signed and entered its order of dismissal on September 1, 2015. Alers filed a timely notice of appeal.[4]

DISCUSSION

1. *Standard of Review*

A demurrer tests the legal sufficiency of the factual allegations in a complaint. We independently review the superior court's ruling on a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense. (*Loeffler v. Target Corp*. (2014) 58 Cal.4th 1081, 1100; *McCall v. PacifiCare of Cal., Inc*. (2001) 25 Cal.4th 412, 415.) We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded and matters of which judicial notice has been taken. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) We liberally construe the pleading with a view to substantial justice between the parties. (Code Civ. Proc., § 452; *Schifando*, at p. 1081.)

We review orders for monetary sanctions under the deferential abuse of discretion standard. (*Patel v. Crown Diamonds, Inc*. (2016) 247 Cal.App.4th 29, 37; *Burkle v. Burkle*

---

[4] The notice of appeal was filed only on behalf of Alejandro Alers, Sr. After noting that fact, Bank of America in its respondent's brief acknowledges this court may construe the notice liberally to include an appeal pursuant to Code of Civil Procedure section 904.1, subdivision (a)(12), by Alejandro Alers, Jr., from the sanctions order entered jointly and severally against him and his client. (See *Eichenbaum v. Alon* (2003) 106 Cal.App.4th 967, 974.)

(2006) 144 Cal.App.4th 387, 399.) "The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712, fns. omitted.)

2. *The Trial Court Properly Sustained Bank of America's Demurrer to Alers's Complaint To Set Aside the April 11, 2013 Final Judgment*

As discussed, the April 11, 2013 judgment in favor of Bank of America in Alers's original 2012 lawsuit for breach of contract and fraud was affirmed on appeal in October 2013 by the appellate division of the Los Angeles Superior Court. For the most part, final judgments are not subject to attack after the time for seeking a new trial has expired and any appeals have been exhausted: "Once a judgment is final, collateral attack will not lie for nonjurisdictional errors. 'Except in the case of extrinsic fraud, "[a] judgment on the merits that is not void on its face and [thus] subject to collateral attack is protected by the doctrine of res judicata after the time for ordinary direct attack has passed."'" (*Schwab v. Southern California Gas Co*. (2004) 114 Cal.App.4th 1308, 1327; accord, *Aerojet-General Corp. v. American Excess Ins. Co.* (2002) 97 Cal.App.4th 387, 398 & fn. 3; see generally 8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 215, p. 823.)

Recognizing the rule protecting the finality of judgments, Alers alleged in his complaint, and asserts on appeal, that he was entitled to set aside the April 11, 2013 judgment in a direct action

based on extrinsic fraud or mistake, arguing that doctrine is broad enough to encompass any misconduct by one party that prevented the other party from fairly participating in the underlying proceedings. Alers's general description of the breadth of the court's equitable power to set aside a final judgment is not incorrect: "A final judgment may be set aside by a court if it has been established that extrinsic factors have prevented one party to the litigation from presenting his or her case. [Citation.] The grounds for such equitable relief are commonly stated as being extrinsic fraud or mistake. However, those terms are given a broad meaning and tend to encompass almost any set of extrinsic circumstances which deprive a party of a fair adversary hearing. It does not seem to matter if the particular circumstances qualify as fraudulent or mistaken in the strict sense." (*In re Marriage of Park* (1980) 27 Cal.3d 337, 342; see *Bennett v. Hibernia Bank* (1956) 47 Cal.2d 540, 558-559 ["extrinsic mistake may be a ground for vacation of a judgment by an independent action in equity where there has been no fair adversary trial"].)

The misconduct Alers alleged, however, does not constitute extrinsic fraud. Each deceptive or improper act was part of the underlying case itself and, at most, intrinsic fraud: "Intrinsic fraud goes to the merits of the prior proceeding and is 'not a valid ground for setting aside a judgment when the party has been given notice of the action and has had an opportunity to present his case and to protect himself from any mistake or fraud of his adversary but has unreasonably neglected to do so.'" (*In re Margarita D.* (1999) 72 Cal.App.4th 1288, 1295.) "Fraud is extrinsic when the defrauded party was deprived of the opportunity to present his or her claim or defense to a court.

[Citations.] Intrinsic fraud, on the other hand, is fraud which goes to the actual merits of the litigation. Unlike 'extrinsic' fraud, it does not preclude any party from raising a claim or defense; nor does it prevent a party from knowing about or attending a proceeding." (*Edwards v. Centex Real Estate Corp*. (1997) 53 Cal.App.4th 15, 41.) Intrinsic fraud "cannot be used to overthrow a judgment, even where the party was unaware of the fraud at the time and did not have a chance to raise it at trial." (*Pour Le Bebe, Inc. v. Guess? Inc.* (2003) 112 Cal.App.4th 810, 828.)

Alers asserts Bilog's declaration was false, the third-party check and teller's log presented with her declaration were inadmissible hearsay and the deposit agreement that purportedly authorized the debit against his checking account was not properly authenticated. All of those claims go directly to the merits of the action. Each could have been presented as evidentiary objections at the hearing on the summary judgment motion. None prevented Alers from having his day in court.

Similarly, Alers's contention the bank relied upon a misleadingly redacted version of the deposit agreement should have been raised as an objection or in opposition to the motion in the trial court. (A complete copy of the agreement was attached to Bilog's declaration.) To the extent Alers now complains the judge hearing the motion did not rule on his objection that Bilog's declaration was not based on personal knowledge or impermissibly weighed the evidence and resolved disputed issues of material fact, those purported errors also go to the merits of the issues in dispute and should have been argued to the appellate division as part of Alers's appeal. Simply asserting he was deprived of a fair opportunity to participate in the

proceedings as a result of the cumulative effect of the bank's litigation tactics and judicial error does not convert classic instances of intrinsic fraud into extrinsic fraud or otherwise justify setting aside the April 11, 2013 final judgment. (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 10 ["[a]fter the time for seeking a new trial has expired and any appeals have been exhausted, a final judgment may not be directly attacked and set aside on the ground that evidence has been suppressed, concealed, or falsified; in the language of the cases, such fraud is 'intrinsic' rather than 'extrinsic'"]; *Buesa v. City of Los Angeles* (2009) 177 Cal.App.4th 1537, 1546 ["the introduction of perjured testimony is a classic example of intrinsic fraud"]; *Kachig v. Boothe* (1971) 22 Cal.App.3d 626, 634 ["in a litigated case the concealment or suppression of material evidence is held to constitute intrinsic fraud"]; *American Borax Co. v. Carmichael* (1954) 123 Cal.App.2d 204, 208 [alleged misrepresentation by parties' counsel regarding title to property in pretrial proceedings was not extrinsic fraud].)

In sum, Alers was neither unaware of Bank of America's summary judgment motion nor deprived of an opportunity to fully litigate it: Represented by counsel, he had an opportunity to conduct discovery, file opposition papers and objections to the bank's evidence in support of summary judgment and appeal from the judgment after the motion was granted. The trial court properly concluded Alers's complaint did not allege extrinsic fraud and thus failed to state grounds upon which the April 11, 2013 judgment could be set aside.

3. *The Trial Court Did Not Abuse Its Discretion in Imposing Monetary Sanctions on Alejandro Alers, Jr.*

a. *Governing law*

Section 128.7 "authorizes trial courts to impose sanctions to check abuses in the filing of pleadings, petitions, written notices of motions or similar papers." (*Musaelian v. Adams* (2009) 45 Cal.4th 512, 514.) Subdivision (b) of the statute provides, "[b]y presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, petition, written notice of motion, or other similar paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met: [¶] (1) It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. [¶] (2) The claims, defenses, and other legal contentions therein are warranted by existing law. . . . [¶] (3) The allegations and other factual contentions have evidentiary support . . . ." Subdivision (c) states, "If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation." Sanctions may include "directives of a nonmonetary nature," "an order to pay a penalty into court," and "payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation." (§ 128.7, subd. (d).)

Section 128.7 further provides "[a] sanction imposed for violation of subdivision (b) shall be limited to what is sufficient to deter repetition of this conduct or comparable conduct by others

similarly situated." (§ 128.7, subd. (d).) The Legislature accordingly designed the statute "to be remedial, not punitive." (*Li v. Majestic Industry Hills, LLC* (2009) 177 Cal.App.4th 585, 591.) "While section 128.7 does allow for reimbursement of expenses, including attorney fees, its primary purpose is to deter filing abuses, not to compensate those affected by them." (*Musaelian v. Adams*, *supra*, 45 Cal.4th at p. 519; see also *Martorana v. Marlin & Saltzman* (2009) 175 Cal.App.4th 685, 699 [sanctions under section 128.7 "'are not designed to be punitive in nature but rather to promote compliance with statutory standards of conduct'"].)

Consistent with its remedial purpose, section 128.7, subdivision (c)(1), "describes a two-step procedure for a section 128.7 sanction motion. The moving party serves the sanctions motion on the offending party without filing it. The opposing party then has 21 days to withdraw or correct the improper pleading and avoid sanctions (the safe harbor waiting period). At the end of the waiting period, if the pleading is not withdrawn or appropriately corrected, the moving party may then file the motion." (*San Diegans for Open Government v. City of San Diego* (2016) 247 Cal.App.4th 1306, 1316; accord, *Martorana v. Marlin & Saltzman*, *supra*, 175 Cal.App.4th at pp. 698-699; see *Malovec v. Hamrell* (1999) 70 Cal.App.4th 434, 440.)

b. *Bank of America satisfied section 128.7's 21-day notice requirement*

Bank of America served Alers with a copy of its motion for sanctions by mail on July 10, 2015. Service is reflected in a signed proof of service attached to the notice of motion, which was filed with the court on August 6, 2015—27 days after service.

The notice of motion specifically identified as grounds for sanctions that Alers and Alers, Jr. violated their certification under section 128.7, subdivision (b)(1), that the lawsuit was not being presented for an improper purpose and that Alers, Jr., violated his certification under section 128.7, subdivision (b)(2), that the claims were warranted by existing law.

After the trial court made its rulings on the demurrer and the motion for sanctions and directed counsel for the bank to give notice, Alers, Jr., belatedly stated, "Before the court goes, I never received notice from Bank of America, from counsel here regarding his 128.7 motion." Counsel for the bank responded that the service copy of the motion was included with a letter that Alers, Jr., acknowledged he received. The court then commented, "There's nothing before me at this time, Mr. Alers, to indicate that service was not proper. . . . So the ruling will stand."

In his opening brief Alers asserts the service copy of the sanctions motion was not included with the courier-delivered July 10, 2015 letter and argues the trial court should have continued the matter to allow counsel to prepare arguments in opposition to the motion. However, Alers never requested a continuance in the trial court. (See *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 417 [issues not raised in trial court cannot be raised for first time on appeal]; *Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1314 [same].) In addition, he failed to seek reconsideration of the sanctions ruling to place before the trial court new evidence indicating he did not receive the motion at least 21 days before it was filed and cites to nothing in the record on appeal that would support his contention the motion was not served and filed in full compliance with the requirements of section 128.7. This argument has been forfeited.

(See, e.g., *Aguilar v. Avis Rent A Car System*, *Inc.* (1999) 21 Cal.4th 121, 132 ["[w]e reject defendants' claim, therefore, because they failed to provide this court with a record adequate to evaluate this contention"]; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296 [to overcome presumption on appeal that an appealed judgment or order is correct, appellant must provide adequate record demonstrating error]; *Hotels Nevada, LLC v. L.A. Pacific Center*, *Inc.* (2012) 203 Cal.App.4th 336, 348 [duty of appellant to provide adequate record].)

c. *The trial court did not abuse its discretion in concluding Alers's lawsuit was objectively unreasonable*

The trial court concluded not only that Alers's complaint simply alleged instances of intrinsic, not extrinsic, fraud—a ruling we affirm—but also that his lawsuit was "clearly legally unsound," justifying the award of sanctions against his counsel, Alers, Jr., under section 128.7 for filing a frivolous action. (See *San Diegans for Open Government v. City of San Diego*, *supra*, 247 Cal.App.4th at p. 1318 [whether pleading is frivolous under section 128.7 is measured by an objective standard, evaluating the merits from "a reasonable person's perspective"]; *Peake v. Underwood* (2014) 227 Cal.App.4th 428, 448 ["when determining whether sanctions should be imposed [under section 128.7], the issue is not merely whether the party would prevail on the underlying factual or legal argument. Instead, courts should apply an objective test of reasonableness, including whether 'any reasonable attorney would agree that [the claim] is totally and completely without merit'"].)

Sanctions are not mandatory under section 128.7 even if a claim is frivolous. (*Peake v. Underwood*, *supra*, 227 Cal.App.4th

at p. 448; *Kojababian v. Genuine Home Loans, Inc.* (2009) 174 Cal.App.4th 408, 422.) Although we may have exercised that discretion differently, in light of the well-established case law that a final judgment may not be set aside on the ground evidence has been suppressed, concealed or falsified, the trial court's award of sanctions against Alers, Jr. was not arbitrary or capricious and must be affirmed. (See *Haraguchi v. Superior Court*, *supra*, 43 Cal.4th at pp. 711-712.)

4. *The Trial Court Abused Its Discretion in Imposing Monetary Sanctions on Alejandro Alers, Sr.*

Monetary sanctions may not be awarded against a represented party based on the filing of a frivolous pleading. (§ 128.7, subd. (d)(2).) However, in addition to finding Alers's complaint "clearly legally unsound," the trial court found "it is clearly designed to harass defendant and cause unnecessary expense," authorizing sanctions against both Alers and his counsel under section 128.7, subdivision (b)(1). The court explained, "[T]he instant action appears to be the fourth attempt by plaintiff to address a dispute over a $4,500 debit to his bank account in 2008. . . . [A]fter losing his case on the merits in the first lawsuit, plaintiff and plaintiff's counsel have continued to try to re-litigate the issues finally determined against them going so far as to sue defendant's attorney[s] as well. Plaintiff and plaintiff's counsel have been told by two previous courts that the claims against defendant and defendant's counsel cannot proceed. Yet plaintiff and plaintiff's counsel filed the instant lawsuit asserting essentially the same arguments that have previously been rejected. This is patently harassing conduct . . . ."

The court's rationale for finding the instant case had been filed for an improper purpose, although based on undisputed

facts, significantly misdescribes Alers's lawsuits subsequent to the original 2012 action and the grounds on which they were rejected. The initial action alleging Bank of America improperly debited Alers's checking account was resolved on its merits by summary judgment motion, and Alers's appeal was unsuccessful. His second and third lawsuits (the federal RICO action and the lawsuit that resulted in our opinion in *Alers v. Wright*, B265070, *supra*), in contrast, challenged the litigation-related conduct of Bank of America and its in-house and outside counsel and were not attempts to relitigate the original contract claim. Moreover, those cases were not dismissed because the alleged misconduct was proved not to have occurred or did not constitute improper activity by the bank or its lawyers. Rather, in both cases the courts, including this one, held, even if the alleged misconduct did take place, the actions were absolutely privileged—by the *Noerr-Pennington* doctrine in the federal case and by Civil Code section 47, subdivision (b), in *Alers v. Wright*—and thus not a viable ground for Alers's liability claims.[5]

The instant lawsuit repeated those as-yet-untried allegations of litigation-related misconduct and sought to set aside the final judgment in the original action based on extrinsic fraud, a valid legal theory. It was not attempting to relitigate the initial contract or fraud claims (although an opportunity to do so was the relief requested). While the current action may be

---

[5] The federal RICO lawsuit did include allegations regarding the bank's conduct prior to the filing of the original lawsuit, as well as allegations of misconduct during the litigation itself. As discussed, the United States District Court ruled the first category of claims was barred by res judicata (claim preclusion).

objectively unreasonable because Alers's counsel did not adequately appreciate the difference between extrinsic and intrinsic fraud, the history of the litigation provides no support for the finding the lawsuit was filed to coerce an undeserved payment from Bank of America or for any other improper purpose. Accordingly, the sanctions award against Alers is reversed.

5. *Bank of America's Motion for Sanctions on Appeal Is Denied*

Concurrently with the filing of its respondent's brief, Bank of America moved pursuant to Code of Civil Procedure section 907 and California Rules of Court, rule 8.276(a)(1) to sanction Alers and Alers, Jr., jointly and severally, a total of $25,550 ($10,550 payable to the bank; $15,000 payable to the clerk of this court) for pursuing a frivolous appeal. Pursuant to California Rules of Court, rule 8.276(d), we requested that Alers and Alers, Jr., respond to the motion.

Code of Civil Procedure section 907 provides, "When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." (See Cal. Rules of Court, rule 8.276(a)(1) [court of appeal may impose sanctions on a party or an attorney for taking a frivolous appeal or appealing solely to cause delay].) The Supreme Court in *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650, set forth the applicable standard: "[A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit."

Although we have affirmed the order dismissing Alers's lawsuit to set aside the April 11, 2013 judgment and upheld the award of sanctions against Alers, Jr., in light of the reversal of the sanctions award against Alers, we cannot say the appeal was "'totally and completely devoid of merit.'" (*In re Marriage of Flaherty*, *supra*, 31 Cal.3d at pp. 649-651.) Nor does evidence exist that the appeal was brought for an improper motive to harass Bank of America or simply for delay. The motion for sanctions is denied.

DISPOSITION

The order dismissing the action is affirmed. The order awarding sanctions against Alejandro Alers, Sr., is reversed. The order awarding sanctions against Alejandro Alers, Jr. is affirmed. Bank of America's motion for sanctions on appeal is denied. Bank of America is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.